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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 349

E. R. CHRISTENSON, d/b/a Christenson Electric Company,
Petitioner,

vs.

DIVERSIFIED BUILDERS INCORPORATED, JOHNSON CONSTRUCTION CO., a corporation, and KAISER COMPANY, a corporation, Joint Venturers; FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Maryland corporation; AMERICAN RE-INSURANCE COMPANY, a New York corporation; GENERAL REINSURANCE CORPORATION, a New York corporation; EMPLOYERS REINSURANCE CORPORATION, a Missouri corporation; NORTH AMERICAN REINSURANCE CORPORATION, a New York corporation; FEDERAL INSURANCE COMPANY, a New Jersey corporation; and GENERAL INSURANCE COMPANY, a Washington corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GEORGE W. LATIMER,
KEITH E. TAYLOR,
of and for
PARSONS, BEHLE, EVANS & LATIMER,
Attorneys for Petitioner.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on May 6, 1964.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 331 F. 992. No opinions were issued by the District Court.

JURISDICTION

Judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 6, 1964. A copy of the Judgment is attached hereto as Appendix A. Petitioner duly filed a Petition for Rehearing. A copy of the Petition is attached hereto as Appendix B. The order of the United States Court of Appeals for the Tenth Circuit denying said petition was entered on June 15, 1964. A copy of the order is attached hereto as Appendix C. The jurisdiction of this court is invoked under the provisions of 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court should grant this petition to afford petitioner his constitutional right to a trial by jury.

2. Whether the Court of Appeals properly ruled that petitioner's Demand for Jury Trial was not timely with respect to its cause of action against Diversified.

3. Whether the Court of Appeals erred in then ruling that by joining additional parties as allowed by Rule 20(a) and two separate and independent causes of action as permitted by Rule 18(a) of the Federal Rules of Civil Procedure, petitioner lost his rights to a jury trial of legal issues in his cause of action against the sureties after having made timely and due demand as to them and having not otherwise waived his right to jury trial as to that cause of action and as to those issues.

4. Whether the rulings of the Court of Appeals deprived petitioner of his right of a jury trial guaranteed by the Seventh Amendment to the Constitution.

These questions are posed by the following rulings of the United States Court of Appeals of the Tenth Circuit:

(a) That petitioner's Demand for Jury Trial was not timely with respect to its cause of action against Diversified Builders Incorporated, Johnson Construction Company and Kaiser Company; therefore, that petitioner had waived his right to a jury trial as to that cause of action.

(b) That petitioner's Demand for Jury Trial was timely filed with respect to his separate cause of action against respondent sureties and that there was no waiver of jury trial with respect to that separate cause of action.

(c) That the trial court properly tried the cause of action against the principals without a jury and that the breach of contract issue "cannot now be relitigated"; hence, that by joining the sureties as parties pursuant to Rule 20(a) and two separate and independent causes of action as permitted by Rule 18(a) of the Federal Rules of Civil Procedure, petitioner lost his rights to a jury trial, not otherwise waived and properly demanded pursuant to the provisions of Rule 38 of the Federal Rules of Civil Procedure.

FEDERAL RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States and Rules 18(a), 20(a), 38(a), 38(b) and 39 of the Federal Rules of Civil Procedure are here pertinent.

STATEMENT OF THE CASE

The action below initially was filed against petitioner in the District Court of Box Elder County, State of Utah by Diversified Builders Incorporated, Johnson Construction Company and Kaiser Company, acting as a joint venture. Because of the multiplicity of respondents, hereinafter in this brief said plaintiffs in the action will be called "Diversified". The complaint avers that in November of 1960, Diversified entered into a subcontract with petitioner whereby petitioner agreed to perform certain electrical work involved in the construction of Air Force Plant No. 78 under prime contract between Diversified and Thiokol Chemical Corporation. The complaint contains three causes of action, each alleging a breach of this subcontract. All of these claims stated in the complaint involve issues at law—no equitable relief is prayed for (R. 3-5).

The action was removed to the United States District Court upon petition of petitioner (R. 2-3). Following removal, petitioner filed an "Answer, Counterclaim and Complaint for Complete Relief" which contained the following:

1. Answer to complaint of Diversified raising only legal issues (R. 15-16).

2. Counterclaim against Diversified raising only legal issues (R. 17-20).

3. A cause of action against Fidelity & Deposit Company of Maryland, American Re-Insurance Company, General Reinsurance Corporation, Employers Reinsurance Corporation, North American Reinsurance Corporation, Federal Insurance Company, General Insurance Company, each a respondent in this proceeding, collectively called "Sureties" in this petition. The cause of action against the Sureties avers payment and materialmen's and performance bonds in

the penal sum of $11,862,000.00 and asserts that each of the Sureties is liable to petitioner on said bonds because of breach by Diversified of the subcontract between Diversified and petitioner. Only legal issues are raised in this cause of action against the Sureties (R. 27-33).

4. Causes of action against United States of America hereinafter called "United States" (R. 20-26) and against Thiokol Chemical Corporation, hereinafter called "Thiokol," (R. 33-39) through which petitioner sought the equitable relief of satisfying any judgment obtained by foreclosing a mechanics and materialmen's lien upon the real property.

Petitioner filed a demand for a jury trial (R. 58) which was denied by the District Court (R. 72-73, 75, 77, 56). In his denial, the trial judge stated:

> "The Court: This a foreclosure suit, isn't it?
>
> "Mr. Latimer: Yes, your Honor.
>
> "The Court: It doesn't require a jury, I will try it, and we don't need any pre-trial order at all.
>
> "Mr. Latimer: There is a question of a breach of contract.
>
> "The Court: That is all right. It is all one suit. We will take care of that.
>
> "Mr. Latimer: We have requested a jury for the purpose of ascertaining—
>
> "The Court: You are going to have a hard time with me on that subject, but we will reserve the ruling until we get down and know more about the case."

Prior to trial of the matter by the District Court, petitioner and the United States and Thiokol resolved their disputes among themselves. Consequently, petitioner filed a motion to dismiss its causes of action against them (R. 78, 82, 87, 92). At the same time, it filed a Renewed Demand for Jury Trial (R. 77-78). Since one of the defendants

initially objected to the dismissing of the causes of action without prejudice against it, the matter was placed upon the law and motion calendar and was set for hearing on January 7, 1963 (R. 85-87). The motions and petitioner's Renewed Demand for Jury Trial were taken under advisement by the District Court (R. 82, 87). The parties themselves on the same day filed "Stipulation" and "Notice of Dismissal" pursuant to the provisions of Rule 41 of the Federal Rules of Civil Procedure dismissing all of petitioner's claims against the United States and Thiokol (R. 82-83). On the same day all of the parties entered into a "Consent to Amend Pleadings", which deleted all reference to the claims against the United States and Thiokol (R. 84, 94-106).

Following trial and judgment, petitioner timely filed a Motion for New Trial upon the ground that the trial court had erred in denying petitioner's "Demand for Jury Trial" and in denying petitioner's "Renewed Demand for Jury Trial". This motion was denied by the District Court (R. 109). Petitioner duly processed his appeal from the judgment of the District Court to the United States Court of Appeals for the Tenth Circuit. The Circuit Court affirmed the judgment of the trial court, Appendix A. The propriety of this action by the Court of Appeals is the subject of this petition.

The chronology of events upon which petitioner relies is set forth as follows:

	Filing Date
1. Complaint alleging breach of contract in three separate counts, was filed by Diversified against petitioner in the District Court of Box Elder County, State of Utah (R. 2, 15).	Oct. 26, 1961
2. Petition for Removal to the United States District Court was filed by petitioner (R. 2-3).	Nov. 15, 1961

	Filing Date
3. Answer, Counterclaim and Complaint for Complete Relief was filed by petitioner. This pleading contains a denial of the material allegations of Diversified's complaint, a counterclaim against Diversified for breach of contract, a complaint for complete relief by virtue of Diversified's breach of contract against Sureties and claim for relief seeking foreclosure of a materialman's lien against United States and Thiokol (R. 15-39).	Jan. 5, 1962
4. The District Court entered order joining additional parties (R. 52-53).	Jan. 12, 1962
5. Diversified replied to petitioner's counterclaim and filed answer to petitioner's complaint for complete relief (R. 53-55).	Jan. 23, 1962
6. Answer of counter-claim defendants was filed by Sureties (R. 56-58).	Feb. 6, 1962
7. Petitioner filed his demand for jury trial (R. 58).	Feb. 9, 1962
8. Answer and Cross-Claim of Thiokol was filed (R. 58-66).	Mar. 14, 1962
9. Minute entry was entered by the court setting the matter down for "non-jury trial" (R. 74-75).	Record does not disclose filing date
10. Answer of the United States was filed (R. 75-76).	June 4, 1962
11. Petitioner filed Motion for Order permitting him to file Answer, Amended Counterclaim and Complaint for Complete Relief deleting claims against United States and Thiokol (R. 79).	Dec. 5, 1962
12. Notice of setting for "non-jury trial" (enclosing tentative calendar) was served upon the parties by the clerk of the District Court (R. 77).	Dec. 12, 1962

	Filing Date
13. Petitioner filed motion to dismiss Complaint for Complete Relief as to the United States and Thiokol (R. 78).	Dec. 17, 1962
14. Petitioner filed "Renewed Demand for Jury Trial" (R. 77-78).	Dec. 17, 1962
15. All parties signed stipulation permitting Diversified to amend the Complaint (R. 79-80).	Dec. 20, 1962
16. Amendments to complaint were filed by Diversified (R. 80-81).	Dec. 20, 1962
17. Hearing was set on January 7, 1963 upon petitioner's motion to dismiss its causes of action against the United States and Thiokol, upon its motion to amend its Complaint for Complete Relief to delete reference to these defendants and on its Renewed Demand for Jury Trial (R. 82).	Jan. 2, 1963
18. Petitioner's motions were taken under advisement by the District Court (R. 85-88).	Jan. 7, 1963
19. Following said hearing, and on the day thereof, all of the parties signed stipulation for dismissal of the Complaint for Complete Relief against the United States and Thiokol pursuant to the provisions of Rule 41 of the Federal Rules of Civil Procedure (R. 82-83).	Jan. 7, 1963
20. Following said hearing, and on the same day thereof, petitioner dismissed his Complaint for Complete Relief against the United States and Thiokol by filing notice of dismissal thereof with the clerk of the court pursuant to Rule 41 of the Federal Rules of Civil Procedure (R. 83).	Jan. 7, 1963
21. Following said hearing, and on the same day thereof, each of the parties signed Consent to Amended Pleadings	Jan. 7, 1963

	Filing Date
which pleadings on that day were filed with the clerk of the court and which deleted all reference to the claims against the United States and Thiokol (R. 84).*	
22. Petitioner filed his Answer to Diversified's "Amendments to Complaint" (R. 88-89).	Jan. 10, 1963
23. Non-jury trial commenced. On the first day thereof, the court below in open court dismissed petitioner's claims against the United States and Thiokol. Those claims were abandoned when the motion to file "Answer, Amended Counterclaim and Complaint for Complete Relief" was filed and they were never submitted to trial (R. 93).	Jan. 29, 1963
24. Formal order of the court dismissing petitioner's Complaint for Complete Relief against the United States and Thiokol was filed following the trial (R. 107).	Feb. 1, 1963
25. Judgment was entered by the court (R. 107-108).	Apr. 3, 1963
26. Petitioner filed Motion for New Trial asserting that the court below erred in refusing to grant to him a jury trial and that he should be granted a new trial before a jury by virtue of his initial "Demand for Jury Trial" and his "Renewed Demand for Jury Trial" (R. 108-109).	Apr. 12, 1963
27. Petition also filed Objections to Findings of Fact. Those objections, together with petitioner's motion for new	Record does not disclose filing date

*Although petitioner's "Answer, Amended Counterclaim and Complaint for Complete Relief" deleting all reference to claims against the United States and Thiokol was lodged with the clerk on January 7, 1963 (R. 84), it was not filed by the clerk until February 1, 1963, following the trial on the same day that the formal order dismissing the United States and Thiokol was filed (R. 94-107).

trial were duly heard by the court. The parties were directed to submit new Findings of Fact and the motion for new trial was denied (R. 109).

28. Amended Judgment was entered by the court (R. 109-110). — June 3, 1963

29. Petitioner filed his Notice of Appeal (R. 110). — June 7, 1963

30. The Court of Appeals filed and entered its opinion and judgment. (See Appendix.) — May 6, 1964

31. Petitioner duly filed his Petition for Rehearing. (See Appendix.) — May 25, 1964

32. The Court of Appeals denied petitioner's Petition for Rehearing. (See Appendix.) — June 15, 1964

FEDERAL JURISDICTION IN FIRST INSTANCE

The District Court for the Northern District of Utah obtained jurisdiction by virtue of a petition for removal from the First Judicial District Court of Utah which was predicated on diversity of citizenship and the amount in controversy.

REASONS FOR GRANTING THE WRIT

The decision of the Court below is in conflict with prior decision of this Court and other Courts of Appeal which jealously have guarded a party's constitutional right to jury trial. The ruling of the Court below that by joining two separate and independent causes of action against separate defendants, petitioner lost his right to jury trial, not otherwise waived and duly demanded, by operation of law, is of crucial and overriding importance. The sanctity of the constitutional rights of petitioner, and of all other persons whose causes

may reach the court below, are in peril and can be preserved only if this Court exercises its prerogative to intervene in their behalf by granting this Petition.

ARGUMENT

POINT I.

THE PRECISE QUESTION DECIDED BY THE COURT BELOW, I.E. WHETHER THE JOINDER OF PARTIES AND OF ISSUES AS ENCOURAGED BY THE FEDERAL RULES OF CIVIL PROCEDURE, OPERATES AS A MATTER OF LAW TO DEPRIVE A LITIGANT OF HIS RIGHT TO JURY TRIAL NOT OTHERWISE WAIVED AND PROPERLY DEMANDED, HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT.

POINT II.

THE DECISION OF THE COURT BELOW IS IN BASIC CONFLICT WITH AND IS CONTRARY TO PRIOR DECISIONS OF THIS COURT.

POINT III.

THE DECISION OF THE COURT BELOW IS IN BASIC CONFLICT WITH AND IS CONTRARY TO PRIOR DECISIONS OF OTHER COURTS OF APPEAL.

POINT I.

THE PRECISE QUESTION DECIDED BY THE COURT BELOW, I.E. WHETHER THE JOINDER OF PARTIES AND OF ISSUES AS ENCOUR-

AGED BY THE FEDERAL RULES OF CIVIL PROCEDURE, OPERATES AS A MATTER OF LAW TO DEPRIVE A LITIGANT OF HIS RIGHT TO JURY TRIAL NOT OTHERWISE WAIVED AND PROPERLY DEMANDED, HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT.

Petitioner respectfully submits that this is a question of Federal law which should be settled by this Court. Otherwise, litigants will accept the open invitation of the Federal Rules of Civil Procedure, as did petitioner here, and may, like petitioner, be held to have lost their constitutional rights to jury trial by lower courts narrowly interpreting the purpose and effect of these Rules. If the Federal Rules of Civil Procedure conceal such legal frailties as are herein involved, this Court should reveal them for public scrutiny to protect litigants from a loss of guaranteed constitutional rights.

Rule 18(a) of the Federal Rules of Civil Procedure reads in pertinent part as follows:

> JOINDER OF CLAIMS. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim *may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules* 19, 20 *and* 22 *are satisfied.* (Emphasis added.)

Rule 20(a) insofar as applicable provides:

> PERMISSIVE JOINDER. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions, or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one

action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief and against one or more defendants according to their respective liabilities.

Rule 38 of the Federal Rules of Civil Procedure reads in pertinent part:

> (a) RIGHT PRESERVED. *The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.* (Emphasis added.)
>
> (b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

Rule 39(a) of the Federal Rules of Civil Procedure provides:

> When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. *The trial of all issues so demanded shall be by jury, unless* (1) *the parties* or their attorneys of record, *by written stipulation* filed with the court or *by an oral stipulation* made in open court and entered in the record, *consent* to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not

exist under the Constitution or statutes of the United States. (Emphasis added.)

In this case, petitioner asserted through his counterclaim a cause of action against Diversified for breach of contract. However, he also had a separate and independent claim arising by virtue of the same breach of contract against the Sureties. As is demonstrated at record, page 30, petitioner's cause of action against the Sureties was grounded upon Title 14, Chapter 2, Section 1, Utah Code Annotated, 1953, which provides, under the circumstances of this case, that petitioner "Shall have a direct right of action against the Sureties upon such bond for the reasonable value of the materials furnished or labor performed." Hence, it is clear that petitioner could have filed an independent action directly in either the State or the Federal Court against the Sureties. Hade he done so, his timely Demand for Jury Trial would have required that he be afforded his constitutional right to jury trial both as to the contract violation itself and as to the reasonable value of the materials furnished and labor performed by him under the terms of said contract.

However, rather than file an independent action, he sought to avoid multiple actions and issues by following the spirit of Rules 18(a) and 20(a) of the Federal Rules of Civil Procedure and joined the separate cause of action against the sureties with other separate causes of action in the subject law suit. Unfortunately for petitioner under the holding of the court below, this method of proceeding cost him his right to a trial by jury for the court ruled as follows:

a) That petitioner's Demand for Jury Trial was not timely as to the breach of contract issue between the petitioner and Diversified, and

b) That although petitioner's Demand for Jury Trial was timely as to its separate and distinct cause of action

against the Sureties, the trial court properly tried the cause of action against the principal without a jury and that consequently the breach of contract issue "cannot now be relitigated"; hence, that by joining the Sureties and two separate and independent causes of action as permitted by Rules 18(a) and 20(a) of the Federal Rules of Civil Procedure, as a matter of law, petitioner lost his right to jury trial by means other than those set forth in Rule 39 of the Federal Rules of Civil Procedure.

The propriety of each of these rulings is highly dubious. However, even assuming arguendo that the court below was correct in its rulings, we submit that this Court should decide these issues to put litigants who otherwise might rely upon the Federal Rules of Civil Procedure upon fair notice. These two rulings of the court will be discussed in sequence:

(a) The court below ruled that the "last pleading directed to such issue" as contemplated by Rule 38(b) of the Federal Rules of Civil Procedure was the reply to petitioner's counterclaim against Diversified and that the demand therefor was not timely as to Diversified. We submit that this interpretation is erroneous and that in the context of multiple parties and multiple issues, the "last pleading directed to such issue" is the pleading of the last party to plead with respect to the issue involved. Under this latter interpretation, petitioner's Demand for Jury Trial was timely as to all parties and as to all issues.

There is a paucity of authority on this narrow question. Two Federal District Court cases, neither of which chose to reach this question, dealt with this general subject and point in the direction of the position here urged by petitioner.

In the case of *Spiro* v. *Pennsylvania Railroad Company*, 3 F. R. D. 351 (S. D. N. Y. 1942), the court found in a situa-

tion similar to that in the instant case that there had been a waiver as to some issues but not as to others but concluded that:

> [T]his appears to be a proper case for the exercise of the court's discretion under Rule 39(b) in favor of an order that all issues as to both defendants be tried by a jury. Any other course would either deprive the plaintiff of his constitutional right to a jury trial or would lead to duplication and confusion. (Citing cases.)

Similarly, in the case of *McKnight* v. *Mutual Broadcasting System, Inc.*, 14 F. R. D. 174 (S. D. N. Y. 1953), a jury trial was granted as a discretionary matter notwithstanding a waiver of the right to jury trial as to some parties. It should be noted, however, that in *McKnight*, the most recent case dealing with the question at hand, the court confessed some confusion, when it said:

> Federal Rule 38, 28 U. S. C. A., requires that a jury demand be made "not later than ten days after the service of the last pleading" directed to the issue on which the jury trial is sought. *This is somewhat ambiguous in the situation of multiple defendants involving multiple answers filed at different times.* (Emphasis added.)

It is mentioned that in both cases a jury trial was granted by the trial judge as a matter of judicial discretion. However, the ambiguity and confusion mentioned in the last case is eliminated if the rule is interpreted in the light of the importance to the right of a trial by jury and as contended for by petitioner in this case.

As applied to the facts of this case, it is to be noted from the chronology of events that on January 12, 1962, the court ordered the joining of additional parties necessary for com-

plete relief under the counterclaim, which included the United States of America, Thiokol Chemical Corporation and the Surety Companies. The United States had 60 days' time in which to answer, the Surety Companies 40 days and Thiokol 20 days. This order was signed before Diversified filed a responsive pleading and certainly the issues could not be framed until the necessary parties and particularly the Surety Companies had answered for the petitioner had a direct right of action against them. As soon as it appeared that they were adopting the same defenses as Diversified, then a demand for jury trial was made. Petitioner's right to a jury must be determined as of the time it is made and two parties found by the Trial Court to be necessary for complete relief under the counterclaim had not even appeared. That they did appear subsequent to the demand is evident from the Record (R. 58-75). The fact that they later made a settlement arrangement satisfactory to the petitioner and were later dismissed does not operate retroactively and undermine a prior demand. Surely to hold that the answers of all the third-party defendants which touch on all issues cannot be given consideration as a pleading to the issue is to make a hodge-podge of legal procedure. The effect of that sort of ruling is to time the demand for a jury trial to the appearance of the first party even though the framework for the trial is still in the process of being erected. We do not believe that rationale squares with the philosophy that the courts should guard jealously the right to a trial by jury on all legal issues and against all parties.

(b) However, even assuming for purposes of argument that the court was correct in its first ruling that the Demand for Jury Trial was not timely as to the breach of contract issue between petitioner and Diversified, we submit that the court below grossly erred in its second ruling that petitioner also had lost his right to try the issue of contract breach and

damages as between himself and the Sureties before a jury. It is conceded that with respect to the Sureties, petitioner's demand was timely under the provisions of Rule 38 of the Federal Rules of Civil Procedure. In this regard, the court below stated:

> *As to the issue raised by the pleadings between appellant and the Surety Companies upon the separate cause of action, the jury demand was timely filed.* (Emphasis added.)

Having been timely failed, we submit that petitioner's right to jury trial could be waived only as set forth specifically in Rule 39 of the Federal Rules of Civil Procedure which is quoted above. Neither the parties nor their attorneys of record by written stipulation filed with the court or by oral stipulation made in open court consented to a trial by the court sitting without a jury. However, the court below did not concern itself with the niceties of Rule 39. It summarily disposed of this problem by stating:

> "However, one of the essential ingredients of appellant's cause of action upon the bond against the Surety Companies is proof of a breach of contract by the principal. That element of the cause of action has now been adjudicated in the cause between Diversified and Christenson and cannot now be relitigated."

Hence, by joining all issues and all parties necessary for complete relief in one action, a permissible proceeding under Rule 18(a) and 20(a) Federal Rules of Civil Procedure, the petitioner finds that by the ruling of the court below he has been deprived of his right to jury trial as a matter of law, although not otherwise waived. Indeed, rather than waive his right to jury trial, and to avoid any possible claims of waiver, petitioner filed his "Renewed Demand for Jury Trial" on December 17, 1962 (R. 77-78).

Aside from being inconsistent within its own four corners the decision below is contrary to the decisions of this Court dealing with the subject of waiver. Even assuming arguendo that it may have been proper for the court below to find that the demand for jury trial was untimely as to some issues, a denial of a jury in this case is nonetheless in conflict with the concept of waiver as laid down by this Court. In the case of *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389, 393 (1937) the Court said:

> [A]s the right to a jury is fundamental, courts indulge every reasonable presumption against waiver.

Again in *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 510, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959) the Court said:

> In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency.

See also *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 385. In clear conflict with these decisions, the court below, by narrowly interpreting the Federal Rules so as to deprive petitioner of his right to jury trial, not only indulged every reasonable presumption in favor of waiver, but went way beyond that indulgence and converted a claimed waiver against one party to be a waiver against all third parties. Further, this court said in the case of *Johnson* v. *Zerbst*, 304 U. S. 458-69, 82 L. Ed. 1461, that a court should not impose a waiver unless there was an intentional relinquishment or abandonment of a known right, and that courts should indulge every reasonable presumption against a waiver of a constitutional right. Here again, there was no intentional relinquishment or abandonment of the right to jury trial by petitioner. Rather, petitioner, relying on the Federal Rules

of Civil Procedure hereinbefore cited, joined issues and parties in the suit below and filed his Demand for a Jury Trial when the first of the third parties appeared. How then has there been a relinquishment or abandonment of his right against them? And how can the previously decided cases by this Court be interpreted to mean that a right to a trial by a jury admittedly timely as against the Sureties may be taken away by a trial judge ordering a trial before himself on an erroneous theory and an Appeals Court saying it was tried by the judge in disregard of the right but the petitioner lost his right because it was taken from him by the Trial Judge? If that is the law then two wrongs take away a right.

POINT II.

THE DECISION OF THE COURT BELOW IS IN BASIC CONFLICT WITH AND IS CONTRARY TO PRIOR DECISIONS OF THIS COURT.

In a series of decisions, this Court has established the fundamental principle that a joinder of legal and equitable claims under Rule 18(a) of the Federal Rules of Civil Procedure cannot work to deprive a party of his constitutional right to a jury trial. See *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 8 L. Ed. 2d 54, 82 S. Ct. 894 (1962); *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 3 L. Ed. 2d 988, 79 S. Ct. 948 (1959); *Meeker* v. *Ambassador Oil Corp.*, 375 U. S. 160 (1963).

Although these decisions do not resolve the precise issue here involved, we submit that they are wholly inconsistent with the ruling which is the subject of this Petition. The mere fact of joinder of claims and parties pursuant to Rule 18(a) does not deprive a party of his constitutional right to jury trial. Professor Moore succinctly stated the intent of the rule as follows: (5 Moore's Federal Practice P. 143)

> The mandate of the rule-making act was, and the clear objective of the rule is, that the right of jury trial should not be affected.

This is not only a policy reflected in the decisions of this court cited above and inherent in the rules, but one fairly compelled by the Constitution itself as may be seen by a reference to the *Beacon Theatres case, supra*, stating the case of *Dimick* v. *Schiedt*, 293 U. S. 474, 486, to the effect that:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with utmost care.

The most recent decision reflecting this Court's solicitous attitude toward the cherished right to jury trial may be seen in *Mecker* v. *Ambassador Oil Corp., supra* in which this Court reversed a decision by the United States Court of Appeals for the Tenth Circuit. That decision merely reiterates and restates what has become a solid fundamental in our jurisprudence; namely that by joinder of two claims under the Federal Rules of Civil Procedure, a party shall not be deprived of his right to a trial by jury.

It is pertinent to note that in *Mecker* v. *Ambassador Oil Corp.*, the Supreme Court also cited *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 471-472, 8 L. Ed. 2d 44, 82 S. Ct. 894 (1962). The Court in that case specifically treated the problem of the party complying with Rule 18(a) and joining separate claims. The Court stated:

> Thus Rule 18(a) provides that a plaintiff "may join either as independent or as alternate claims as many claims *either legal or equitable* or both as he may have against an opposing party." And Rule 18(b) provides: "Whenever a claim is one heretofore cog-

> nizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive right of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money."
>
> The Federal Rules did not, however, purport to change the basic holding of Scott v. Neely *that the right to trial by jury of legal claims must be preserved.* Quite the contrary, Rule 38(a) expressly reaffirms that constitutional principle, declaring: "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." (Emphasis added.)

In *Simler* v. *Connor*, 372 U. S. 221, 222 (1963), cited by the court below in the opinion which is the subject of this Petition, this Court stated the federal policy here applicable as follows:

> The federal policy favoring the jury trial is of historic and continuing strength. Parsons v. Bedford (US) 3 Pet. 433, 446-449, 7 L. Ed. 732, 736, 737; Scott v. Neely, 140 US 106, 35 L. Ed. 358, 11 S. Ct. 712; Byrd v. Blue Ridge Rural Electric Co-op, Inc., 356 US 525, 537-539, 2 L. Ed. 2d 953, 962, 963, 78 S. Ct. 893; Beacon Theatres, Inc. v. Westover, 359 US 500, 3 L. Ed. 2d 988, 79 S. Ct. 948; Dairy Queen, Inc. v. Wood, 369 US 469, 8 L. Ed. 2d 44, 82 S. Ct. 894.

Although the above cases deal factually with instances where there has been a joinder of legal and equitable claims, they are apposite here as well because the policy they evince is not one which should be limited to particular facts or pigeon-holed away conveniently. Rather, the policy should extend to the case at hand since, in fact and effect, it too is an instance where the court below has interpreted the Fed-

eral Rules in such a fashion as to deprive the petitioner of his rights as well as depriving the Rules of their efficacy by avoiding the admonition to give parties a just, speedy and inexpensive determination of every action. (Cf. *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 472 (1962). The effect of the court's decision is to say that because petitioner took advantage of the modern joinder provisions of Rule 18(a) and joined two legal issues for trial, petitioner shall be denied his right to jury trial, because the demand, which although timely as to some issues, was late as to others. This seems wholly inconsistent with this court's decisions above showing that the Federal Rules should have no such effect.

POINT III.

THE DECISION OF THE COURT BELOW IS IN BASIC CONFLICT WITH AND IS CONTRARY TO PRIOR DECISIONS OF OTHER COURTS OF APPEAL.

Again, this precise issue has not been resolved by other Courts of Appeal. However, we submit that the following decisions from other Circuits are apposite and that their holdings are contrary to that of the court below.

The United States Court of Appeals for the Sixth Circuit very cogently supported the principle here urged by Petitioner when it stated in *Black* v. *Boyd*, 248 F. 2d 156 (6th Cir., 1957):

> We think the Rules of Civil Procedure change that result. Rule 13 (g) permits a defendant to file a cross-claim against a co-party arising out of the same transaction. Rule 18(a) permits a plaintiff in his complaint or the defendant in a counterclaim or a cross-claim to join either as independent or alternate claims as many claims "*either legal* or equitable or both" as he may have against any opposing party. Rule 1 pro-

> vides that the rules shall be construed to secure the just, speedy, and inexpensive determination of every action. Rule 2 provides that there shall be but one form of action. Rule 38(a) provides that the right of trial by jury "shall be preserved to the parties inviolate" and provides the time for making the demand after the filing of a pleading. Under these rules it would appear that a party is encouraged to join in one action both legal and equitable claims, counterclaims or cross claims *without waiving any right to trial by jury of any claim*, which if prosecuted independently, would entitle him to a jury trial. (Emphasis added.)

This statement illustrates clearly that the Federal Rules of Civil Procedure were to be used by litigants freely and that the rules were not to operate to deprive a party of his right to a jury trial or diminish that right in any way.

Similarly, it has been stated and held many times by United States Courts of Appeal that the joinder of legal and equitable claims under Rule 18(a) of the Federal Rules of Civil Procedure should not deprive a party of his right to a jury trial. Thus, in the case of *Bruckman v. Holizer*, 152 F. (2) 730, 733 (9 Cir., 1946), the United States Court of Appeals for the Ninth Circuit stated:

> We regard the rules enlarging the powers of the single tribunal to hear and determine equitable and legal transactions in which the pre-existing right to a jury trial is to be preserved, as a long forward step in our judicial procedure. We consider one of its major purposes is to remove the expensive and time-losing requirement of two separate suits to give the litigant his jury as well as his equitable relief. We are not in accord with the extreme judicial conservatism which instinctively clings to outmoded intricate processes and would seek to nullify or minimize every attempt for their simplification.

See also *Ring* v. *Spina*, 166 F. 2d 546 (2d Cir., 1948); *Leimer* v. *Woods*, 196 F. 2d 828 (8th Cir., 1952) which not only hold that the joinder of legal and equitable claims will not deprive a party of his right to a jury trial, but state the even more fundamental policy that the joinder provisions of the Federal Rules should never operate to deprive a party of his constitutional right.

CONCLUSION

It is respectfully concluded:

a) That the Court below did not follow the Federal policy favoring jury trial as directed by this Court;

b) That the issue here involved is an important question of Federal law which should be, but has not been, resolved by this Court;

c) That the judgment and decision of the court below is inconsistent with and in conflict with prior decisions of the Court;

d) That the judgment and decision below is inconsistent with and in conflict with decisions of other Circuits.

For the above and foregoing reasons, it is submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE W. LATIMER,

KEITH E. TAYLOR,

of and for

PARSONS, BEHLE, EVANS & LATIMER,

Attorneys for Petitioner.

APPENDIX "A"

Judgment

Seventh Day, April Term, Wednesday, May 6th, 1964.

Before Honorable Jean S. Breitenstein, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Utah and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7398

E. R. CHRISTENSON, d/b/a Christenson Electric Company, *Appellant*,

vs.

DIVERSIFIED BUILDERS INCORPORATED, JOHNSON CONSTRUCTION CO., a corporation, and KAISER COMPANY, a corporation, Joint Venturers; FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Maryland corporation; AMERICAN RE-INSURANCE COMPANY, a New York corporation; GENERAL REINSURANCE CORPORATION, a New York corporation; EMPLOYERS REINSURANCE CORPORATION, a Missouri corporation; NORTH AMERICAN REINSURANCE CORPORATION, a New York corporation; FEDERAL INSURANCE COMPANY, a New Jersey corporation; and GENERAL INSURANCE COMPANY, a Washington corporation, *Appellees*.

PETITION FOR REHEARING

Appellant respectfully requests a rehearing of the decision of May 6, 1964 in the above entitled cause upon the following grounds:

The court erred in its decision by holding as a matter of law that by joining independent claims against separate counterclaim defendants with a cause of action against Diversified Builders, Inc., as permitted by Rule 18(a) of the Federal Rules of Civil Procedure, appellant waived his rights to a jury trial upon legal issues of fact as guaranteed by the Seventh Amendment to the Constitution of the United States. It is respectfully submitted that in so ruling this court violated appellant's constitutional rights as enunciated by the Supreme Court of the United States.

BRIEF

In its decision, this court ruled as follows:

1. That the causes of action asserted by appellant gainst Diversified Builders Incorporated, Johnson Construction Co. and Kaiser Company, on the one hand, and against the defendant sureties on the other hand, were separate and independent causes of action.

2. That one of the "essential ingredients" of appellant's separate causes of action against the two classes of defendants was the "breach of contract by the principal".

3. That appellant's demand for jury trial was not timely with respect to its cause of action against the principal; therefore, appellant waived his right to jury trial as to that cause of action.

4. That appellant's demand for jury trial was timely filed with respect to his separate cause of action against the

appellee sureties and that there was no waiver of jury trial with respect to that separate cause of action.

5. That the court below properly tried the cause of action against the principal without a jury and that the breach of contract issue "cannot now be relitigated"; hence that by joining two separate and independent causes of action as permitted by Rule 18(a) of the Federal Rules of Civil Procedure, appellant lost his rights to a jury trial, not otherwise waived and properly demanded pursuant to the provisions of Rule 38 of the Federal Rules of Civil Procedure.

Assuming for purposes of this argument the propriety of the court's holding that the two causes of action were separate and independent and that appellant waived his rights to a jury trial with respect to his separate cause of action against the principal, we submit that the court erred prejudicially and deprived appellant of his constitutional right to jury trial by affirming the action of the court below in forcing the trial before the court without a jury of the separate and independent cause of action concerning which demand for jury trial admittedly was timely filed.

The court prefaced its decision by characterizing the *cherished* right to jury trial as follows:

> We start with the fundamental premise that "trial by jury is a vital and cherished right, integral to our judicial system. * * *" City of Morgantown, W. Va. v. Royal Insurance Co., 337 U. S. 254, 258, and, "* * * as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver. * * *" Aetna Insurance Co. v. Kennedy, 301 U. S. 389, 393.

In *Johnson* v. *Zerbst*, 304 U. S. 458-569, 82 L. Ed. 1461, the United States Supreme Court held that a court should not impose a waiver unless there was an intentional relinquish-

ment or abandonment of a known right and that courts should indulge every reasonable presumption against a waiver of a constitutional right. Contrary to the rule of reason, this tribunal then proceeded to indulge every reasonable presumption against the preservation of appellant's right to jury trial duly and properly demanded under the provisions of Rule 38 of the Federal Rules of Civil Procedure. In addition, by its ruling this court reached a conclusion in direct and open contravention of appellant's constitutional rights as clearly enunciated by the United States Supreme Court in cases cited by the court but summarily rejected at page 3 of the opinion. There this court cited *Simler* v. *Connor*, 372 U. S. 221 and *Meeker* v. *Ambassador Oil Corp.*, 375 U. S. 160 but footnotes them out claiming they involve both legal and equitable claims and therefore the court was not confronted "with the common problems arising when legal and equitable claims for relief are asserted in one action". We invite the court to examine *Simler* v. *Connor*. That case obviously did not involve common problems arising when legal and equitable claims for relief are asserted in one action. In that case the Supreme Court specifically found as to all of the issues in that action:

> The question involved are traditional common-law issues which can be and should have been submitted to a jury under appropriate instructions as petitioner requested.

The United States Supreme Court in the *Simler* case, however, stated that:

> The Federal policy favoring jury trial is of historic and continuing strength citing Parsons v. Bedford (U. S.) 3 Pet. 433, 446-449, 7 L. Ed. 732, 736, 737; Scott v. Neeley, 140 U. S. 106, 35 L. Ed. 358, 11 S. Ct. 712; Byrd v. Blue Ridge Rural Electric Co-op, Inc., 356 U. S. 525, 537-539, 2 L. Ed. 2d 953, 962, 963, 78 S. Ct. 893, Beacon Theaters, Inc. v. Westover, 359 U. S. 500, 3 L. Ed. 2d 988, 79 S. Ct. 948, Dairy

Queen, Inc. v. Wood, 369 U. S. 469, 8 L. Ed. 2d 54, 82 S. Ct. 894.

Meeker v. *Ambassador Oil Corp.*, 375 U. S. 160 cited in the footnote did involve the joinder of legal and equitable claims for relief in the same action. However, we assert that that case stands for the same proposition, as does *Simler* v. *Connor* which is that by taking advantage of Rule 18 of the Federal Rules of Civil Procedure, a party cannot be deemed to have waived his constitutional right to a jury trial of legal issues. It is pertinent to note that in *Meeker* v. *Ambassador Oil Corp.*, the Supreme Court also cited *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 8 L. Ed. 2d 44, 82 S. Ct. 894. The Supreme Court in that case specifically treated the problem of the party complying with Rule 18(b) and joining separate claims. The court stated:

> Thus Rule 18(a) provides that a plaintiff "may join either as independent or as alternate claims as many claims *either legal or equitable* or both as he may have against an opposing party" and Rule 18(b) provides: "whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive right of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money."
>
> The Federal Rules did not, however, purport to change the basic holding of Scott v. Neeley *that the right to trial by jury of legal claims must be preserved.* Quite the contrary, Rule 38(a) expressly reaffirms that constitutional principle, declaring: "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." (Emphasis added.)

As is demonstrated at page 30 of the transcript of record in the above entitled matter, appellant's cause of action against the sureties was grounded upon Title 14, Chapter 2, Section 1, Utah Code Annotated, 1953 which provides, under the circumstances of this case, that appellant "shall have a direct right of action against the sureties upon such bond for the reasonable value of the materials furnished or labor performed." Hence, it is clear that appellant could have filed an independent action directly in either the state or the Federal court against the sureties. Had he done so, his timely demand for jury trial would have required that he be given his constitutional right to a trial by jury both as to the contract violation itself and as to the reasonable value of the materials furnished and labor performed by him under the terms of said contract. However, rather than file an independent action, he accepted the open invitation contained in the Federal Rules of Civil Procedure and joined that separate cause of action with other separate causes of action in the subject law suit. Underlying the rule of joinder is the concept that multiplicity of suits should be avoided but that purpose will not be served by this decision for the court holds that by following the rule this appellant automatically and mysteriously lost his right to jury trial as to those issues. The United States Supreme Court precisely stated in *Dairy Queen, Inc.* v. *Wood*, supra, that the Federal Rules of Civil Procedure were never so intended.

In treating this subject, the United States Court of Appeals for the Sixth Circuit stated in *Charles G. Black* v. *The Honorable Marion S. Boyd*, (1957), 248 F. 2d 156:

> We think the Rules of Civil Procedure change that result. Rule 13(g) permits a defendant to file a cross claim against a co-party arising out of the same transaction. Rule 18(a) permits a plaintiff in his complaint or the defendant in a counterclaim or a

> cross-claim to join either as independent or alternate claims as many claims "*either legal* or equitable or both" as he may have against any opposing party. Rule 1 provides that the rule shall be construed to secure the just, speedy and inexpensive determination of every action. Rule 2 provides that there shall be but one form of action. Rule 38(a) provides that the right of trial by jury "shall be preserved to the parties inviolate" and provides the time for making the demand after the filing of a pleading. Under these rules it would appear that a party is encouraged to join in one action both legal and equitable claims, counterclaims or cross claims *without waiving any right to trial by jury of any claim* which if prosecuted independently, would entitle him to a jury trial. (Emphasis added.)

We submit that the court erred by penalizing the appellant for accepting the invitation to secure the just, speedy and inexpensive determination of all related issues in this law suit by joining them all in one action.

By way of supporting its opinion the court at page 6 relies upon Professor Moore's treatise. Significantly the court quotes the following language from 5 Moore's Federal Practice (2nd Ed.), Sec. 38.39 (2), page 318:

> Where there are plural plaintiffs or plural defendants, it may happen that a demand for jury trial will be timely as to some, and untimely as to other litigants.

However, more significantly, Professor Moore does not take the next step with the court in then holding that the waiver with respect to one party or one cause constitutes a waiver with respect to other parties or other causes. On the contrary, he goes on to cite with approval the language quoted in *Spiro* v. *Pennsylvanic R. Co.*, S. D. N. Y. 1942, 7 FRSCRV 38 B. - 11, Case 1, 3 FRD 351 wherein Judge Leidell stated:

> Clearly and without citation of authority, it cannot be said that the Pullman Company's answer was

> "The last pleading directed to" the issue of the joint negligence of the defendants, although it was as to the separate liability of that company. Nor was it the last pleading as to the extent of plaintiff's injuries and damage. Issue has not yet been joined by any answer of the Pennsylvania Company and there has been no waiver by plaintiff of a jury trial of that company's joint or several liability, or the injuries sustained by plaintiff and damage suffered. Since the plaintiff has waived a jury trial only of the issue of the several liability of the Pullman Company, but has not waived it as to all other issues of his claim against that company or as to any issue of his claim against the Pennsylvania Company, this appears to be a proper case for the exercise of the court's discretion under Rule 39(b) in favor of an order that all issues as to both defendants be tried by a jury. *Any other course would either deprive plaintiff of his constitutional right to a jury trial or would lead to duplication and confusion.* (Emphasis added.)

The rule therein announced is poles apart from the principle found in this opinion. Nowhere in that case can any language be found which suggests a court has discretion to take away from a party his constitutional right to a jury trial. That is not a discretionary matter. Of course, had the appellant in this case not made his demand timely as to the sureties then it might have been within the sound discretion of the trial judge to deny him a right to a jury trial against them because of his failure to act promptly. However, once the appellant took action to firm up his privilege it cannot be denied him by the legal fiction of saying the blending of non-jury issues with jury questions clothes the trial judge with discretion to hear the jury issues. Certainly, if legal principles can be compared then the one announced in this opinion clashes head on with the oft repeated holding of the Supreme Court, namely, that issues not requiring jury determination, when joined with legal issues which are entitled

to be heard by a jury does not destroy the right to a jury trial.

In the case at bar because of the timely demand against the sureties the court below was faced with two legal alternatives which would not deny the plaintiff his constitutional right,

1. Try one of the causes to a jury and one to the court with the resultant duplication and confusion which we submit would not be exercising common sense.

2. Call a jury and have it determine all issues and thereby give appellant his constitutional right to a jury trial.

Instead of taking the proper and legal course set out in the last numbered paragraph the trial judge for a wrong reason refused to impanel a jury and the court's present opinion seeks to support that ruling on a different but nevertheless erroneous base.

For the reasons set forth above, we respectfully submit that the court should grant a new hearing in the above entitled matter and following such rehearing that the prior decision of this court should be reversed and the case remanded to the District Court for jury trial.

Respectfully submitted,

GEORGE W. LATIMER,

KEITH E. TAYLOR,

of and for

PARSONS, BEHLE, EVANS & LATIMER,

Attorneys for Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel for appellant hereby certify that the foregoing Petition for Rehearing is submitted in good faith and not for purpose of vexation or delay.

.....

George W. Latimer

.....

Keith E. Taylor

APPENDIX "C"

Order denying appellant's petition for rehearing
Thirteenth Day, May Term, Monday, June 15th, 1964.

Before Honorable Alfred P. Murrah, Chief Judge, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

(On June 26, 1964, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of Utah.)

APPENDIX "D"

E. R. CHRISTENSON d/b/a Christenson Electric Company,
Appellant,

v.

DIVERSIFIED BUILDERS INCORPORATED et al.,
Appellees.

No. 7398

United States Court of Appeals

Tenth Circuit

May 6, 1964

Rehearing Denied June 15, 1964

Before BREITENSTEIN, HILL and SETH, Circuit Judges.

HILL, Circuit Judge.

This action was originally filed against the appellant, Christenson, in the state district court in Utah on October 26, 1961, by Diversified Builders Incorporated, Johnson Construction Company and Kaiser Company, acting as a joint adventure and hereinafter referred to as Diversified. The complaint contains three causes of action, each of which alleges the breach of a certain subcontract entered into by appellant and Diversified. This subcontract provides for the performance by appellant of certain electrical work involved in the construction of an Air Force Plant under prime contract between Diversified and Thiokol Chemical Corporation, Wasatch Division (Thiokol).

On November 15, 1961, appellant removed the case to the United States District Court for the District of Utah and *on January 5, 1962*, filed a pleading entitled "Answer, Counterclaim and Complaint for Complete Relief". It contained the following: (1) A denial of the material allegations of Diversified's complaint; (2) a counterclaim against Diversified for breach of the same subcontract; (3) a separate cause of action against the appellee surety companies based upon the alleged breach of contract by Diversified and the bond furnished by them to secure the payment of labor and material claims in connection with the job; (4) equitable causes of action against Thiokol and the United States for foreclosure of a materialman's lien.

The surety companies, the United States and Thiokol were made parties to the action at appellant's request. The causes of action against the United States and Thiokol were dismissed on January 7, 1963, and they are no longer in this case. We are, therefore, not confronted with the common problems arising when legal and equitable claims for relief are asserted in one action such as were involved in Simler v. Connor, 372 U. S. 221, 83 S. Ct. 609, 9 L. Ed. 2d 691 and Mecker v. Ambassador Oil Corp., 375 U. S. 169, 84 S. Ct. 273, 11 L. Ed. 2d 261.

On January 23, 1962, Diversified filed a reply to appellant's counterclaim *and* also *answered* the complaint for complete relief. On February 6, 1962, *the surety companies* filed an answer to the cause of action asserted against them upon the surety bond. *On February* 9, appellant filed a "Demand for Jury Trial" and on December 17, 1962, a "Renewed Demand for Jury Trial". In the meantime, i. e., from February 9 until December 17, various pleadings on behalf of the United States, Thiokol and appellant were filed. The case proceeded to trial before the court, without a jury, and resulted in a judgment adverse to appellant. The record does not show that the trial court entered any order denying the formal demand for a jury trial. After his motion for new trial was denied, appellant perfected this appeal.

The sole question presented is whether the trial court erred by, in effect, denying appellant's demand for a jury trial.

[1, 2] We start with the fundamental premise that "[t]rial by jury is a vital and cherished right, integral in our judicial system. * * *" City of Morgantown, W. Va. v. Royal Insurance Co., 337 U. S. 254, 258, 69 S. Ct. 1067, 1069, 93 L. Ed. 1347. And, "* * * as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver. * * *" Aetna Insurance Co. v. Kennedy, 301 U. S. 389, 393, 57 S. Ct. 809, 811, 81 L. Ed. 1177.

[3] The procedural aspects of the right to trial by jury in the federal courts are governed by Rule 38, F. R. Civ. P., 28 U. S. C. A., which preserves to the parties "inviolate" the right to a jury trial as declared by the Seventh Amendment

or given by the statutes of the United States.[2] It has long been held under Rule 38 that there is an automatic waiver of the right to a trial by jury unless a timely demand therefor is made, i. e., not later than 10 days after service of *the last pleading relating to the issue involved.* See United States v. Moore, 340 U. S. 616, 71 S. Ct. 524, 95 L. Ed. 582; Ward v. Brown, 10 Cir., 301 F. 2d 445; American Fidelity & Casualty Co. v. All American Bus Lines, 10 Cir., 190 F. 2d 234, cert. denied, 342 U. S. 851, 72 S. Ct. 79, 96 L. Ed. 642; Tomlin v. Pope & Talbot, Inc., 9 Cir., 282 F. 2d 447; McNabb v. Kansas City Life Ins. Co., 8 Cir., 139 F. 2d 591; Roth v. Hyer, 5 Cir., 142 F. 2d 227, cert. denied, 323 U. S. 712, 65 S. Ct. 38, 89 L. Ed. 573; Goldblatt v. Inch, 2 Cir., 203 F. 79; Gulbenkian v. Gulbenkian, 2 Cir., 147 F. 2d 173; Rodenbur v. Kaufmann, D. C. Cir., 320 F. 2d 679; May v. Melvin, 78 U. S. App. D. C. 368, 141 F. 2d 22; 5 Moore's Federal Practice (2nd Ed.), § 38.43, pp. 332-338. And, where there are multiple parties in the suit, the right may be waived as to some and not as to others. Thus, Professor Moore says "Where there are plural plaintiffs or plural defendants, it may happen that a demand for jury trial will be timely as to some, and untimely as to other litigants. * * *" 5 Moore's Federal Practice (2nd Ed.), § 38.39[2], p. 318. In the case of McKnight v. Mutual Broadcasting System, 14 F. R. D. 174 (S. D. N. Y. 1953), the court held that, while a demand for jury trial was timely as to some of the defendants, it was not timely as to other defendants; but, that, in the exercise of the discretion authorized by Rule 39(b),

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[2]Rule 38(b) and (d) provides:

"Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."

"The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

F. R. Civ. P., a jury trial would be granted as to all of the defendants.

[4] The significant point in this case is that two separate and independent causes of action are asserted by Christenson—one by way of counterclaim against Diversified for breach of the subcontract and one against the Sureties on their bond. It is true that as a general rule the surety's obligation is primary and original as well as direct. 72 C. J. S., Principal and Surety, § 87, p. 567. But, a creditor's right to proceed against the surety exists independently of his right to proceed against the principal. 72 C. J. S., Principal and Surety, §§ 245, 249, pp. 699-700; 50 Am. Jur., Suretyship, § 172, p. 1017. *Accordingly, the last pleading required in this case as to the counterclaim against Diversified was the reply thereto.* See 5 Moore's Federal Practice (2nd Ed.), § 38.39[2], pp. 314-319.

[5-7] In applying those rules to the facts of this case, we find that the reply by Diversified to appellant's counterclaim was filed on January 23, 1962, and appellant's demand for jury trial was filed more than 10 days later. Thus, the demand for jury trial was not timely as to the claim asserted in the counterclaim against Diversified and Christenson was therefore not entitled to a jury trial on this issue as a matter of right. As to the issue raised by the pleadings between appellant and the surety companies upon that separate cause of action, the jury demand was timely filed. However, one of the essential ingredients of appellant's cause of action upon the bond against the surety companies is proof of a breach of contract by the principal. That element of the cause of action has now been adjudicated in the cause between Diversified and Christenson and cannot now be relitigated.

Affirmed.